

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NICOLASA J. GOMEZ,)	
)	No. CV-04-3007-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR AN IMMEDIATE
JO ANNE B. BARNHART,)	AWARD OF BENEFITS
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 17, 20), noted for disposition without oral argument on October 11, 2005. Attorney Tom Bothwell represents Plaintiff; Special Assistant United States Attorney Nancy Mishalanie represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 5.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands for an immediate award of benefits.

Plaintiff, 46-years-old at the time of the administrative decision, filed applications for Social Security disability benefits in December 2001 (Tr. at 58-60) and Supplemental Security Income (SSI) benefits in August 2002 (Tr. at 315-317), alleging onset as of July 1, 2001, due to physical impairments including chronic fatigue

1 and episodes of acute pain. Plaintiff, a high-school graduate, had
2 relevant past work as a knifer in a meat packing plant, award
3 winning Wal-Mart department manager (Tr. at 348), bartender and cook
4 at the Olive Garden. (Tr. at 23.) The record reflects Plaintiff
5 worked several jobs at once prior to a decline in her health. (Tr.
6 at 167.) Following a denial of benefits at the initial stage and on
7 reconsideration, a hearing was held before Administrative Law Judge
8 Thomas J. Gaye (ALJ). The ALJ denied benefits; review was denied by
9 the Appeals Council. This appeal followed. Jurisdiction is
10 appropriate pursuant to 42 U.S.C. § 405(g).

11 ADMINISTRATIVE DECISION

12 The ALJ concluded Plaintiff met the non-disability requirements
13 for a period of disability and was insured for benefits through
14 December 2007. (Tr. at 22.) Plaintiff had not engaged in
15 substantial gainful activity and had severe impairments, including
16 lupus, localized and mild arthritis of the knees, possible Sjogren's
17 syndrome with few symptoms noted, Type II diabetes mellitus,
18 fibromyalgia, asthma and obesity, but those impairments were not
19 found to meet the Listings. The ALJ concluded Plaintiff's testimony
20 was not fully credible and that she retained the residual capacity
21 to perform light work, including simple repetitive tasks with
22 additional limitations including pushing/pulling leg controls;
23 concentrated exposure to dust, fumes and gases. (Tr. at 25.) The
24 ALJ found Plaintiff was unable to perform her past relevant work but
25 could perform other work which exists in significant numbers in the
26 national economy; thus, the ALJ concluded there was no disability.

27 ISSUES

28 The question presented is whether there was substantial

1 evidence to support the ALJ's decision denying benefits and, if so,
2 whether that decision was based on proper legal standards. Plaintiff
3 asserts the ALJ erred when he improperly rejected the opinion of
4 treating physician Shirley Mauch, D.O., who confirmed Plaintiff's
5 need to lie down two or three hours during any eight or nine daytime
6 hours was reasonable.

7 STANDARD OF REVIEW

8 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
9 court set out the standard of review:

10 The decision of the Commissioner may be reversed only if
11 it is not supported by substantial evidence or if it is
12 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
13 1097 (9th Cir. 1999). Substantial evidence is defined as
14 being more than a mere scintilla, but less than a
15 preponderance. *Id.* at 1098. Put another way, substantial
16 evidence is such relevant evidence as a reasonable mind
17 might accept as adequate to support a conclusion.
18 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
19 evidence is susceptible to more than one rational
20 interpretation, the court may not substitute its judgment
21 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
22 *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599
(9th Cir. 1999).

23 The ALJ is responsible for determining credibility,
24 resolving conflicts in medical testimony, and resolving
25 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
26 Cir. 1995). The ALJ's determinations of law are reviewed
27 *de novo*, although deference is owed to a reasonable
28 construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

22 SEQUENTIAL PROCESS

23 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
24 requirements necessary to establish disability:

25 Under the Social Security Act, individuals who are
26 "under a disability" are eligible to receive benefits. 42
27 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
28 medically determinable physical or mental impairment"
which prevents one from engaging "in any substantial
gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."

1 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
2 from "anatomical, physiological, or psychological
3 abnormalities which are demonstrable by medically
4 acceptable clinical and laboratory diagnostic techniques."
5 42 U.S.C. § 423(d)(3). The Act also provides that a
6 claimant will be eligible for benefits only if his
7 impairments "are of such severity that he is not only
8 unable to do his previous work but cannot, considering his
9 age, education and work experience, engage in any other
10 kind of substantial gainful work which exists in the
11 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
12 the definition of disability consists of both medical and
13 vocational components.

14 In evaluating whether a claimant suffers from a
15 disability, an ALJ must apply a five-step sequential
16 inquiry addressing both components of the definition,
17 until a question is answered affirmatively or negatively
18 in such a way that an ultimate determination can be made.
19 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
20 claimant bears the burden of proving that [s]he is
21 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
22 1999). This requires the presentation of "complete and
23 detailed objective medical reports of h[is] condition from
24 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
25 404.1512(a)-(b), 404.1513(d)).

26 ANALYSIS

27 Plaintiff asserts the ALJ failed to properly reject the opinion
28 of her treating physician, Dr. Mauch, who concluded it was
reasonable for Plaintiff to lie down during the day in light of her
diagnoses of fibromyalgia, lupus, diabetes, asthma, arthritis,
obesity and possible Sjogren's syndrome. Plaintiff further contends
there were extensive medical notes and clinical examinations to
support Dr. Mauch's opinion. Defendant responds Dr. Mauch's opinion
was contradicted by other doctors, including that of examining
rheumatologist, Dr. Shaul, who concluded Plaintiff could work or
attend school. Additionally, Dr. Mauch noted on April 29, 2002,
that Plaintiff could perform sedentary work up to half-time and
estimated she would be so limited only for three months. (Tr. at
212.) Finally, agency physicians, as well as the medical expert who

1 testified at the hearing, found Plaintiff was able to work.
2 Defendant concludes the ALJ properly resolved the conflicting
3 medical evidence.

4 In a disability proceeding, the treating physician's opinion is
5 given special weight because of his familiarity with the claimant
6 and his physical condition. See *Fair v. Bowen*, 885 F.2d 597, 604-05
7 (9th Cir. 1989). If the treating physician's opinions are not
8 contradicted, they can be rejected only with "clear and convincing"
9 reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If
10 contradicted, the ALJ may reject the opinion if he states "specific,
11 legitimate reasons" that are supported by substantial evidence. See
12 *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463
13 (9th Cir. 1995); *Fair*, 885 F.2d at 605. While a treating
14 physician's uncontradicted medical opinion will not receive
15 "controlling weight" unless it is "well-supported by medically
16 acceptable clinical and laboratory diagnostic techniques," Social
17 Security Ruling 96-2p, it can nonetheless be rejected only for
18 "'clear and convincing' reasons supported by substantial evidence in
19 the record." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir.
20 2001) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.
21 1998)). Furthermore, a treating physician's opinion "on the
22 ultimate issue of disability" must itself be credited if
23 uncontroverted and supported by medically accepted diagnostic
24 techniques unless it is rejected with clear and convincing reasons.
25 *Holohan*, 246 F.3d at 1202-03. Historically, the courts have
26 recognized conflicting medical evidence, the absence of regular
27 medical treatment during the alleged period of disability, and the
28 lack of medical support a doctor's report based substantially on a

1 claimant's subjective complaints of pain, as specific, legitimate
2 reasons for disregarding the treating physician's opinion. See
3 *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604. Here, the
4 treating physician's opinion as to functional limitations was
5 contradicted by the examining physician, Dr. Shaul; thus, only
6 specific, legitimate reasons were required to reject that opinion.

7 The ALJ noted in his opinion with respect to Dr. Mauch's
8 opinion on the ultimate issue of disability:

9 In May 2003, Shirley Mauch, D.O., signed a prepared
10 statement that read "the undersigned agrees that Ms.
11 Gomez's claimed need to lay down/need for recumbence for
12 an average of 2 or 3 out of any 8 or 9 consecutive hours
13 is reasonable consideration [sic] her diagnosed
14 impairments." The undersigned notes this statement is not
15 based on any medical evaluation, but rather is merely
16 affirming the claimant's subjective statement.
17 Accordingly, this statement is given little weight.

18 (Tr. at 24.) The question is whether these reasons are specific,
19 legitimate, and supported by the record.

20 Dr. Mauch was Plaintiff's treating physician for several years;
21 during that time, she prescribed medications and referrals for
22 symptoms diagnosed ultimately as lupus, fibromyalgia, diabetes
23 mellitus Type II, asthma, bilateral knee pain, obesity, Sjogren's
24 Syndrome, and Reynaud's. Systemic lupus erythematosus¹ (SLE) was

25 ¹SLE is defined as an autoimmune disorder which attacks the
26 connective tissue as though it were foreign, causing inflammation.
27 Symptoms include skin rashes, fatigue, fever, loss of appetite,
28 nausea, joint pain and weight loss. American Medical Association,
ENCYCLOPEDIA OF MEDICINE (1989), at 653. Plaintiff, at one time or
another, suffered from all of these symptoms. (Tr. at 165, 174,
207, 258.)

1 based on objective findings noted in October 2001. (Tr. at 162,
2 302.) Fibromyalgia was diagnosed after referral to University of
3 Washington rheumatologists in January 2003, based on their findings
4 of diffuse tender points. (Tr. at 258.) A comprehensive laboratory
5 fatigue work-up was ordered. (Tr. at 259.) On January 28, 2003,
6 university doctors concluded Plaintiff's serologies were consistent
7 with Sjogren's syndrome as well as fibromyalgia. (Tr. at 304.)
8 There was some concern, also, about sleep apnea contributing to
9 Plaintiff's fatigue. Physical therapy and aerobic exercise were
10 recommended.

11 In April 2002, Dr. Mauch concluded Plaintiff was capable of
12 sedentary work with postural limitations, and no walking or standing
13 for more than five to ten minutes. (Tr. at 211.) A year later in
14 March 2003, in response to an inquiry from Plaintiff's counsel, Dr.
15 Mauch found her need to rest for several hours a day reasonable in
16 light of her diagnoses. (Tr. at 313, 325.) Contradicting the
17 disability opinion, was an opinion in July 2002 by Dr. Shaul who
18 concluded, "in terms of the Sjogren's Syndrome," medication was
19 effective and Plaintiff could return to work or school when her knee
20 condition was resolved; that condition did resolve through surgery.
21 (Tr. at 290, 308.) Dr. Shaul did not address limitations due to
22 fibromyalgia. After the denial of benefits by the ALJ, internist
23 Dr. John Moran, M.D., opined in November 2003, that Plaintiff was
24 unemployable due to severe systemic lupus erythematosus, severe
25 fibromyalgia, and mild asthma and diabetes. (Tr. at 320-323.)

26 Medical expert David Williams testified the serologies for
27 distinguishing lupus, Sjogren's and fibromyalgia are similar and
28 very slight differences in blood work analysis can support any or

1 all of those diagnoses. Systemic lupus and fibromyalgia cause
2 fatigue and joint pain. American Medical Association, *ENCYCLOPEDIA OF*
3 *MEDICINE*, (1989) at 453, 653, 909; *Benecke v. Barnhart*, 379 F.3d 587,
4 589 (9th Cir. 2004). Side effects of medications, including Ultram
5 and Plaquenil, include weariness or somnolence. Plaintiff's
6 activities, limited to short distance driving, painting, reading,
7 and light housekeeping with assistance from family members for
8 heavier chores (Tr. at 343-344), are not inconsistent with her need
9 to rest daily.

10 The court concludes the ALJ did not provide specific,
11 legitimate reasons that were supported by the record for rejecting
12 the opinion of the treating physician that Plaintiff's daily need to
13 rest was reasonable in light of her diagnoses. Having failed to
14 provide sufficient reasons to reject Dr. Mauch's opinion as to
15 fatigue, it must be credited as a matter of law. *Lester v. Chater*,
16 81 F.3d 821, 834 (9th Cir. 1995). Based on the testimony of the
17 vocational expert, a need to rest daily for two to three hours
18 precludes work activity. (Tr. at 352.) Thus, the record is
19 complete and no purpose would be served to remand this matter for
20 further administrative proceedings.

21 Plaintiff alleged an onset date of disability of July 1, 2001;
22 however, she testified she continued to work until December 13,
23 2001. (Tr. at 334.) Based on that testimony, an amended onset date
24 of January 1, 2002, is appropriate. Accordingly,

25 **IT IS ORDERED:**

26 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
27 **GRANTED**; the matter is **REMANDED** for an immediate award of benefits
28 based on an amended onset date of **January 1, 2002**. In the event

1 Plaintiff objects to the court's amendment of the onset date, a
2 motion for reconsideration should be **FILED AND SERVED WITHIN TEN**
3 **DAYS** of this Order, moving for remand under sentence four of 42
4 U.S.C. § 405(g). A failure to object will be construed by the court
5 as consent by Plaintiff to the amendment.

6 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
7 **Rec. 20**) is **DENIED**.

8 3. Any application for attorney fees shall be filed by
9 separate motion.

10 4. The District Court Executive is directed to file this Order
11 and provide a copy to counsel for Plaintiff and Defendant. The file
12 shall be **CLOSED** and judgment entered for Plaintiff.

13 DATED December 5, 2005.

14
15 S/ CYNTHIA IMBROGNO
16 UNITED STATES MAGISTRATE JUDGE
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